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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Sarah KATTAN, By Her Parents and Next Friends Susan J. THOMAS and Joseph Kattan, et al., Appellees and Cross-Appellants,

v.

DISTRICT OF COLUMBIA, et al., Appellants and Cross-Appellees.

Nos. 92-7011 and 92-7012.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 7, 1993.
Decided June 15, 1993.
As Amended June 30, 1993.

Donna M. Murasky, Asst. Corp. Counsel, with whom John Payton, Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, Washington, DC, were on the brief, for appellants/cross-appellees.

Patricia D. Douglass, Washington, DC, for appellees/cross-appellants.

Before MIKVA, Chief Judge; D.H. GINSBURG and SENTELLE, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

Opinion concurring in part and dissenting in part filed by Circuit Judge D.H. GINSBURG.

MIKVA, Chief Judge:

Appellants Sarah Kattan and her parents prevailed in a suit against the District of Columbia under the Education for All Handicapped Children Act. 20 U.S.C. §§ 1400-1485. They subsequently applied to the district court for attorneys' fees based on the fee-shifting provision of the Handicapped Children's Protection Act. 20 U.S.C. §1415(e)(4)(B). They requested fees for the services provided by their attorney, Ms. Patricia Douglass, as well as those provided by Mr. Kattan

himself, a lawyer who served as co-counsel to Ms. Douglass. The District of Columbia did not question Mr. Kattan's entitlement to fees, and, approximately three years later, the district court issued a fee award which reflected the labors of both Mr. Kattan and Ms. Douglass.

In the period between the Kattans' fee request and the district court's award, the Supreme Court decided *Kay v. Ehrler*, —— U.S. ——, 111 S.Ct. 1435, 113 L.Ed. 2d 486 (1991), in which it held that an attorney representing himself in a civil rights action was not eligible for attorneys' fees. Two weeks after the district court issued the fee award, the District of Columbia filed a motion in district court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the court eliminate the fees for Mr. Kattan's services, in light of *Kay v. Ehrler*. The district court rejected this motion.

The District of Columbia appeals the district court's award of fees for Mr. Kattan, arguing that *Kay v. Ehrler* compels a contrary result. In a cross-appeal, the Kattans challenge the district court's decision to award fees for Ms. Douglass at a rate of $125 per hour, instead of the $150 per hour that the Kattans requested. For the reasons explained below, we uphold the district court's fee award in all repsects.

I. BACKGROUND

Mr. Joseph Kattan and Ms. Susan J. Thomas, the parents of Sarah Kattan, filed a suit on Sarah's behalf in district court against the District of Columbia. The Kattans alleged that the District had placed Sarah, a disabled child, in a school that was inappropriate under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400–1485. Initially, Mr. Kattan, an attorney, represented his family. Later, at the urging of the district court, he secured Mr. Patricia Douglass as co-counsel.

The district court ultimately held for the Kattans, on August 9, 1988. It determined that Sarah would not receive all of the services guaranteed to her by the EHA at the school to which the District had assigned her, and it ordered the

District to place her at a private school at public expense. Soon thereafter, on October 11, 1988, the Kattans filed an application for attorneys' fees for both Mr. Kattan and Ms. Douglass, under the relevant provision of the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)(B)("In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardians of a handicapped child or youth who is the prevailing party.") The District promptly filed an opposition to the application in which it argued that the amounts requested were too high. The District did not, however, contest the right of an attorney representing himself and his child to receive a fee award under the statute.

It was not until nearly three years later, on October 17, 1991, that the district court finally entered an order awarding fees of $38,000 to Ms. Douglass and $43,050 to Mr. Kattan. In the interim, on April 16, 1991, the Supreme Court had decided *Kay v. Ehrler*, in which the Court ruled that attorneys' fees may not be awarded to attorneys representing themselves in civil rights actions under the fee provision of 42 U.S.C. § 1988 ("[T]he court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

On October 31, 1991, the District of Columbia filed a motion in the district court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the October 17 order awarding attorneys' fees. In the motion, the District contended, for the first time, that a *pro se* litigant who is also a lawyer is not eligible for attorney's fees under the HCPA. The District argued that the Supreme Court's reasoning in *Kay v. Ehrler*, as to 42 U.S.C. § 1988, required the district court to reverse its decision to award attorney's fees to Mr. Kattan under the analogous fee provision of the HCPA. The district court, however, denied the motion on December 11, 1991, holding that the District of Columbia had waived the issue of Mr. Kattan's entitlement to fees by not raising it before the district court awarded fees on October 17, 1991.

The District of Columbia appeals the district court's orders of October 17 and December 11, 1991, insofar as they award attorney's fees to Appellees for time expended on the case by Mr. Kattan. The Kattans, in turn, issue a cross-appeal against the October 17 order to the extent that it limits attorney's fees for Ms. Douglass' services to the rate of $125 per hour, instead of the requested $150 per hour.

II. ANALYSIS

A. Mr. Kattan's Entitlement to Attorney's Fees

The HCPA provides, "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of costs to the parents or guardian of a handicapped child or youth who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B). The District asserts that, in light of *Kay v. Ehrler*, an attorney representing himself is not eligible for a fee award under the HCPA. We do not find it necessary to consider this issue. We agree with the district court that the District of Columbia waived its argument against the availability of fee awards to *pro se* litigants by failing to raise it in 1988 in its original opposition to the Kattans' motion for fees.

[1] The District of Columbia claims that the district court erred by rejecting its Rule 59(e) motion to alter or amend the judgment awarding fees to Mr. Kattan. In that motion, the District asserted that *Kay v. Ehrler* represented a change of law that it could not reasonably have anticipated, and that the Supreme Court decision required the district court to retract its award of fees for Mr. Kattan's services. The district court held that *Kay* was not an unanticipated change in the law and that the District had therefore waived its argument against Mr. Kattan's entitlement to attorney's fees by not raising it before judgment.

We affirm the district court's finding of a waiver. In analogous circumstances, this Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously.

> Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings.

Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 711 (D.C. Cir. 1973), *overruled on different grounds*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). *See also Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued.").

In 1988, when it opposed the Kattans' application for attorneys' fees, the District of Columbia could have proffered a legitimate argument that such fees were not available to *pro se* litigants under the HCPA. Although the Supreme Court did not decide *Kay* until 1991, there was no reason in 1988 for the District of Columbia to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant in an EHA suit or other civil rights case.

At the time, the only binding precedent in our Circuit on the issue of fee awards to lawyers representing themselves related to the fee-shifting provision of the Freedom of Information Act ("FOIA"). *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). That decision held that attorneys acting *pro se* could receive fees under FOIA. *Id.* at 1366. However, much of the Court's reasoning in that decision related specifically to the "policy considerations underlying FOIA." *Id.* Consequently, the District of Columbia had no basis to believe that *Cuneo* settled the HCPA question. If the District wished to claim that Mr. Kattan was ineligible for attorney's fees under the HCPA, it should have attempted to distinguish *Cuneo* from the present case in the district court. Such an argument would have been far from frivolous.

Indeed, in 1984, similarly situated litigants, the defendants in a civil rights action, argued, despite this Circuit's decision in *Cuneo*, that a lawyer representing himself was not

entitled to attorney's fees under 42 U.S.C. §1988. *Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) (on the grounds stated by *Kay v. Ehrler*). Not only did the defendants in *Lawrence* raise this issue—the district court agreed with them. Judge Flannery, in a well-reasoned opinion, explicitly distinguished cases permitting *pro se* attorneys' fees in FOIA suits from cases dealing with fee-shifting in civil rights actions. He cited a series of cases from other circuits holding that *pro se* plaintiffs were not entitled to attorneys' fees under § 1988, and he stated:

> The court finds the statutory analysis and reasoning of these cases persuasive, and does not believe that this Circuit's allowance of attorney fees to *pro se* litigants in FOIA cases changes the analysis, since the intent of Congress and purpose of FOIA and its fee provisions differ significantly from the intent and purposes of §§ 1988 and [42 U.S.C. §] 2000e-5(k).

Id. at 1379.

In the present case, the District of Columbia was in a better position than were the defendants in *Lawrence* to realize that a challenge to a *pro se* plaintiff's attorney's fees might succeed, for the District could look to *Lawrence* itself as an example. It is also worth noting that the Kattans flagged the issue in a footnote in their application for fees. Nevertheless, in its opposition to the Kattans' application, the District chose not to raise the question of the availability of fees for *pro se* litigants. We therefore agree with the district court that the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in a timely manner. The district court clearly did not abuse its discretion by denying the District's Rule 59(e) motion.

[2] Alternatively, the District of Columbia asserts that we should, in light of the change in law brought about by *Kay v. Ehrler*, use our power under 28 U.S.C. § 2106 to review the issue of a *pro se* litigant's eligibility for fees. That section states, "The Supreme Court or any other court of appellate

jurisdiction may . . . vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and direct the entry of such appropriate judgment, decree or order . . . as may be just under the circumstances."

The District is correct that although we do not ordinarily pass on issues that a party failed to raise in a timely fashion in the district court, we sometimes do review such issues when a supervening decision changes the law in the appellant's favor. On occasion, courts of appeals have justified this practice partly on the basis of 28 U.S.C. § 2106. *See, e.g., Pendergrast v. United States*, 416 F.2d 776, 780–81 & n. 19 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 926, 89 S.Ct. 1782, 123 L.Ed.2d 243 (1969). More often, appeals courts seem to have relied primarily on their intrinsic powers to achieve a just resolution. The Supreme Court noted long ago:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. An[d] in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

Patterson v. Alabama, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed. 1082 (1935). *See also, Hormel v. Helvering*, 312 U.S. 552, 558, 61 S.Ct. 719, 722, 85 L.Ed. 1037 (1941) ("[Our decisions], while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."); *Leary v. United States*, 395 U.S. 6, 27–28, 89 S.Ct. 1532, 1543–44, 23 L.Ed.2d 57 (1969); *United States v. Byers*, 740 F.2d 1104, 1115–16 n. 11 (D.C. Cir. 1984).

In each of the cases cited above, the intervening decision enunciated a new legal principle that was previously unavailable to the appellant, for all practical purposes. The present case, on the other hand, does not fit this paradigm.

As we explained above the District of Columbia could have validly disputed Mr. Kattan's entitlement to fees before the Supreme Court decided *Kay v. Ehrler*. Absent "exceptional circumstances," the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below. *See Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Edward Minte Co.*, 803 F.2d 731, 736 (D.C. Cir. 1986). No such exceptional circumstances exist in this case.

B. Ms. Douglass' Rate

In a cross-appeal, the Kattans allege that the district court abused its discretion by awarding them attorney's fees for Ms. Douglass' work at a rate of $125 per hour. The district court set Ms. Douglass' rate at this amount, despite the fact that the Kattans submitted a declaration stating that Ms. Douglass' normal billing rate in her private practice was $150 per hour. For the reasons stated below, we uphold the district court's calculation of fees for Ms. Douglass' services.

The HCPA provides that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1451(e)(4)(C). Both parties agree that an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11, 104 S.Ct. 1541, 1547 n. 11, 79 L.Ed.2d 891 (1984). The parties disagree as to whether the district court was justified, under this principle, in setting Ms. Douglass' rate at $125 instead of her normal billing rate of $150.

[3, 4] A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence. *King v. Palmer*, 950 F.2d 771, 786 (D.C. Cir. 1991) (*en banc*), *cert. denied*, —— U.S. ——, 112 S.Ct. 1290, 117 L.Ed.2d 514 (1992) & —— U.S. ——, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). No such pro-

blems exist in the district court's fee award. The district court applied the law correctly and considered all the available evidence in setting the disputed rate.

The following evidence was available for the district court to consider when it established Ms. Douglass' rate: (1) an affidavit submitted by Ms. Douglass, stating her standard rate of $150 per hour and summarizing her education and experience; (2) a declaration by a local expert retained by the Kattans, setting out broad ranges of fees generally charged by attorneys with various levels of experience in Washington, D.C.; and (3) reports of similar cases in which fees were awarded for comparable work.

In its opposition to the Kattan's application for attorneys' fees, the District suggested that the district court award Ms. Douglass' fees at $75 per hour, the same rate awarded in *Stebbing v. District of Columbia*, another EHA case. C.A. No. 86-2549 (D.D.C. March 2, 1988). The district court, however, refused to set the rate at $75 per hour, because in *Stebbing* "the litigation was not very complicated." On the other hand, the district court noted that "other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time." The court specifically referred to *Moore v. District of Columbia*, 674 F.Supp. 901 (D.D.C. 1987), an EHA case handled by a leading EHA firm in the District. The district court further noted that the plaintiffs had failed to cite a single case in which the fee award was greater than $125.

"In light of the relevant case law and the affidavits submitted by Ms. Douglass," the district court reasonably determined that $125, a figure within the expert's range for attorneys with Ms. Douglass' experience, was the prevailing community rate for Ms. Douglass' services. In setting the fee, the district court considered Ms. Douglass' professional history, the complexity of the case, and the fees awarded in similar cases to attorneys with similar experience. Nothing more was required. Keeping sight of the deference which we owe the district court's fee determinations, we find no reason to overturn the district court's decision.

Finally, the Kattans contend that the district court erred by failing, when establishing Ms. Douglass' rate, to take into account a subparagraph of the HCPA, 20 U.S.C. § 1415(e)(4)(G). That subparagraph provides that the court should not reduce attorneys' fees that "unreasonably exceed[ ] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation," as it is required to by § 1415(e)(4)(F)(ii), if it finds that "the State or local educational agency unreasonably protracted the final resolution of the action or proceeding."

In 1988, the Kattans, asserting that the District had unreasonably protracted the litigation, moved for sanctions against the District under 20 U.S.C. § 1415(e)(4)(G), as well as under 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The Kattans argued in their supporting memoranda that the District's dilatory tactics warranted a greater fee award than that permitted under the HCPA's basic fee-shifting provision.

The Kattans contend that the district court neglected to consider their § 1415(e)(4)(G) claim. In its order of October 1, 1991, the district court expressly rejected the Kattans' motion for sanctions, stating that "[a]lthough defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed.R.Civ. P. 11 or 28 U.S.C. § 1927." Although the district court did not explicitly mention § 1415(e)(4)(G), it implicitly rejected the Kattans' claim under that provision as well, since the Kattans relied on all three provisions in the same motion. In any case, the court clearly made findings as to the blameworthiness of the District's conduct sufficient to reject the Kattans' § 1415(e)(4)(G) claim. We are in no position to second-guess the district court's judgment as to whether the District of Columbia's tactics were unreasonable enough to warrant the award of extra fees.

III. CONCLUSION

Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposi-

tion to the Kattans' application for fees, we find that the District waived the issue and cannot raise it for the first time on appeal. We further hold that the district court was justified in setting Ms. Douglass' fees at $125 per hour. We therefore uphold the district court's fee award in all respects.

It is so ordered.

D.H. GINSBURG, Circuit Judge, concurring in part and dissenting in part:

The district court decided that *Kay v. Ehrler*, —— U.S. ——, 111 S.Ct. 1435 113 L.Ed.2d 486 (1991), in which the Supreme Court held that a *pro se* litigant is not entitled to an attorney's fee under 42 U.S.C. § 1988, does not bar the award of an attorney's fee to a *pro se* litigant under the Handicapped Children's Protection Act. The reason? Simply that "plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision." *Kattan v. District of Columbia*, No. 88-0630 (D.D.C. December 11, 1991), slip op. at 3. This is the proverbial distinction without a difference.

The fee-shifting provision of the HCPA is practically identical to that of § 1988, and the Supreme Court has long required that similar fee-shifting provisions in federal statutes be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2, 109 S.Ct. 2732, 2735 n. 2, 105 L.Ed.2d 639 (1989) ("We have stated that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983) (same standards for awarding attorney's fee apply under all statutes authorizing award of fee to a "prevailing party"); *Northcross v. Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973) (similarity in wording of two statutory fee-shifting provisions is a "strong indication that the two statutes should be interpreted *pari passu*").

The Court in *Kay v. Ehrler* also stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." —— U.S. ——, 111 S.Ct. at 1437. I see no reason to think that the word

"attorney" in the fee-shifting provision of §1988 has a different meaning than it has in the fee-shifting provision of the HCPA. The district court's cursory "analysis" surely offers none.

The district court's grant of a fee for the work performed by Mr. Kattan was clearly an error. The court, however, declines to reach the merits of that question, *See* Ct.Op. at 5, holding that "the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in the district court in a timely manner." Ct.Op. at 8. I disagree.

The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), which held that a *pro se* lawyer was eligible for fees under the Freedom of Information Act, and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C. 1984), between the fee provision of the FOIA and that of § 1988 ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct.Op. at 277 (lauding the district court for "a well-reasoned opinion" in *Lawrence v. Staats*).

It is simply unreasonable to penalize the District of Columbia for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

Finding no waiver of the District's objection, I respectfully dissent from the court's decision affirming the award of an attorney's fee to the *pro se* plaintiff.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 1993 Decided June 15, 1993

Nos. 92-7011 and 92-7012

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *ET AL.*,
APPELLEES AND CROSS-APPELLANTS

v.

DISTRICT OF COLUMBIA, *ET AL.*,
APPELLANTS AND CROSS-APPELLEES

Appeal from the United States District Court
for the District of Columbia
(88cv00630)

Donna M. Murasky, Assistant Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellants/cross-appellees.

Patricia D. Douglass for appellees/cross-appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge*; D.H. GINSBURG and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* D.H. GINSBURG.

MIKVA, *Chief Judge*: Appellants Sarah Kattan and her parents prevailed in a suit against the District of Columbia under the Education for All Handicapped Children Act. 20 U.S.C. §§ 1400–1485. They subsequently applied to the district court for attorneys' fees based on the fee-shifting provision of the Handicapped Children's Protection Act. 20 U.S.C. § 1415(e)(4)(B). They requested fees for the services provided by their attorney, Ms. Patricia Douglass, as well as those provided by Mr. Kattan himself, a lawyer who served as co-counsel to Ms. Douglass. The District of Columbia did not question Mr. Kattan's entitlement to fees, and, approximately three years later, the district court issued a fee award which reflected the labors of both Mr. Kattan and Ms. Douglass.

In the period between the Kattans' fee request and the district court's award, the Supreme Court decided *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), in which it held that an attorney representing himself in a civil rights action was not eligible for attorneys' fees. Two weeks after the district court issued the fee award, the District of Columbia filed a motion in district court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the court eliminate the fees for Mr. Kattan's services, in light of *Kay v. Ehrler*. The district court rejected this motion.

The District of Columbia appeals the district court's award of fees for Mr. Kattan, arguing that *Kay v. Ehrler* compels a contrary result. In a cross-appeal, the Kattans challenge the district court's decision to award fees for Ms. Douglass at a rate of $125 per hour, instead of the $150 per hour that the Kattans requested. For the reasons explained below, we uphold the district court's fee award in all respects.

I. BACKGROUND

Mr. Joseph Kattan and Ms. Susan J. Thomas, the parents of Sarah Kattan, filed a suit on Sarah's behalf in district court against the District of Columbia. The Kattans alleged that the District had placed Sarah, a disabled child, in a school that was inappropriate under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400–1485. Initially, Mr. Kattan, an attorney, represented his family. Later, at the urging of the district court, he secured Ms. Patricia Douglass as co-counsel.

The district court ultimately held for the Kattans, on August 9, 1988. It determined that Sarah would not receive all of the services guaranteed to her by the EHA at the school to which the District had assigned her, and it ordered the District to place her at a private school at public expense. Soon thereafter, on October 11, 1988, the Kattans filed an application for attorneys' fees for both Mr. Kattan and Ms. Douglass, under the relevant provision of the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardians of a handicapped child or youth who is the prevailing party.") The District promptly filed an opposition to the application in which it argued that the amounts requested were too high. The District did not, however, contest the right of an attorney representing himself and his child to receive a fee award under the statute.

It was not until nearly three years later, on October 17, 1991, that the district court finally entered an order awarding fees of $38,000 to Ms. Douglass and $43,050 to Mr. Kattan. In the interim, on April 16, 1991, the Supreme Court had decided *Kay v. Ehrler*, in which the Court ruled that attorneys' fees may not be awarded to attorneys representing themselves in civil rights actions under the fee provision of 42 U.S.C. § 1988 ("[T]he court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

On October 31, 1991, the District of Columbia filed a motion in the district court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the October 17 order awarding attorneys' fees. In the motion, the District contended, for the first time, that a *pro se* litigant who is also a lawyer is not eligible for attorney's fees under the HCPA. The District argued that the Supreme Court's reasoning in *Kay v. Ehrler*, as to 42 U.S.C. § 1988, required the district court to reverse its decision to award attorney's fees to Mr. Kattan under the analogous fee provision of the HCPA. The district court, however, denied the motion on December 11, 1991, holding that the District of Columbia had waived the issue of Mr. Kattan's entitlement to fees by not raising it before the district court awarded fees on October 17, 1991.

The District of Columbia appeals the district court's orders of October 17 and December 11, 1991, insofar as they award attorney's fees to Appellees for time expended on the case by Mr. Kattan. The Kattans, in turn, issue a cross-appeal against the October 17 order to the extent that it limits attorney's fees for Ms. Douglass' services to the rate of $125 per hour, instead of the requested $150 per hour.

II. ANALYSIS

A. Mr. Kattan's Entitlement to Attorney's Fees

The HCPA provides, "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of costs to the parents or guardian of a handicapped child or youth who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B). The District asserts that, in light of *Kay v. Ehrler*, an attorney representing himself is not eligible for a fee award under the HCPA. We do not find it necessary to consider this issue. We agree with the district court that the District of Columbia waived its argument against the availability of fee awards to *pro se* litigants by failing to raise it in 1988 in its original opposition to the Kattans' motion for fees.

As a preliminary matter, we must address the District of Columbia's claim that the district court erred by rejecting its Rule 59(e) motion to alter or amend the judgement awarding fees to Mr. Kattan. In that motion, the District asserted that *Kay v. Ehrler* represented a change of law that it could not reasonably have anticipated, and that the Supreme Court decision required the district court to retract its award of fees for Mr. Kattan's services. The district court held that *Kay* was not an unanticipated change in the law and that the District had therefore waived its argument against Mr. Kattan's entitlement to attorney's fees by not raising it before judgment.

We hold that the district court should not have reached the merits of the District of Columbia's motion. Rule 59(e) of the Federal Rules of Civil Procedure states, "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." FED. R. CIV. P. 59(e). In this case, fourteen days passed between the district court's award of attorneys' fees and the District of Columbia's filing of its Rule 59(e) motion. The district court therefore should have rejected the motion as untimely. "Rule 59(e) motions are expressly limited to the 10–day period following entry of judgment, and the District Court simply has no power to extend that time limitation." *Center for Nuclear Responsibility, Inc., v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 941 (D.C. Cir. 1986).

Alternatively, the District of Columbia asserts that we should, in light of the change in law brought about by *Kay v. Ehrler*, use our power under 28 U.S.C. § 2106 to review the issue of a *pro se* litigant's eligibility for fees. That section states, "The Supreme Court or any other court of appellate jurisdiction may ... vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and direct the entry of such appropriate judgment, decree or order ... as may be just under the circumstances."

The District is correct that although we do not ordinarily pass on issues raised for the first time on appeal, we sometimes do review such issues when a supervening decision

changes the law in the appellant's favor. On occasion, courts of appeals have justified this practice partly on the basis of 28 U.S.C. § 2106. *See, e.g., Pendergrast v. United States*, 416 F.2d 776, 780–81 & n.19 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 926 (1969). More often, appeals courts seem to have relied primarily on their intrinsic powers to achieve a just resolution. The Supreme Court noted long ago:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

Patterson v. Alabama, 294 U.S. 600, 607 (1935). *See also, Hormel v. Helvering*, 312 U.S. 552, 558 (1941) ("[Our decisions], while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."); *Leary v. United States*, 395 U.S. 6, 27–28 (1969); *United States v. Byers*, 740 F.2d 1104, 1115–16 n.11 (D.C. Cir. 1984).

In each of the cases cited above, the intervening decision enunciated a new legal principle that was previously unavailable to the appellant, for all practical purposes. The present case, on the other hand, does not fit this paradigm. In 1988, at the time it opposed the Kattans' application for attorneys' fees, the District of Columbia could have proffered a legitimate argument that such fees were not available to *pro se* litigants under the HCPA. There was no reason in 1988 for the District of Columbia to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant in an EHA suit or other civil rights case.

At the time, the only binding precedent in our Circuit on the issue of fee awards to lawyers representing themselves related to the fee-shifting provision of the Freedom of Infor-

mation Act ("FOIA"). *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). That decision held that attorneys acting *pro se* could receive fees under FOIA. *Id.* at 1366. However, much of the Court's reasoning in that decision related specifically to the "policy considerations underlying FOIA." *Id.* Consequently, the District of Columbia had no basis to believe that *Cuneo* settled the HCPA question. If the District wished to claim that Mr. Kattan was ineligible for attorney's fees under the HCPA, it should have attempted to distinguish *Cuneo* from the present case in the district court. Such an argument would have been far from frivolous.

Indeed, in 1984, similarly situated litigants, the defendants in a civil rights action, argued, despite this Circuit's decision in *Cuneo*, that a lawyer representing himself was not entitled to attorney's fees under 42 U.S.C. § 1988. *Lawrence v. Staats*, 586 F. Supp. 1375 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) (on the grounds stated by *Kay v. Ehrler*). Not only did the defendants in *Lawrence* raise this issue—the district court agreed with them. Judge Flannery, in a well-reasoned opinion, explicitly distinguished cases permitting *pro se* attorneys' fees in FOIA suits from cases dealing with fee-shifting in civil rights actions. He cited a series of cases from other circuits holding that *pro se* plaintiffs were not entitled to attorneys' fees under § 1988, and he stated:

> The court finds the statutory analysis and reasoning of these cases persuasive, and does not believe that this Circuit's allowance of attorney fees to *pro se* litigants in FOIA cases changes the analysis, since the intent of Congress and purpose of FOIA and its fee provisions differ significantly from the intent and purposes of §§ 1988 and [42 U.S.C. §] 2000e–5(k).

Id. at 1379.

In the present case, the District of Columbia was in a better position than were the defendants in *Lawrence* to realize that a challenge to a *pro se* plaintiff's attorney's fees might succeed, for the District could look to *Lawrence* itself as an example. It is also worth noting that the Kattans

flagged the issue in a footnote in their application for fees. Nevertheless, in its opposition to the Kattans' application, the District chose not to raise the question of the availability of fees for *pro se* litigants. We agree, therefore, that the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in the district court in a timely manner. Absent "exceptional circumstances," the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in proceedings below. *See Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Edward Minte Co.*, 803 F.2d 731, 736 (D.C. Cir. 1986). No such exceptional circumstances exist in this case.

B. Ms. Douglass' Rate

In a cross-appeal, the Kattans allege that the district court abused its discretion by awarding them attorney's fees for Ms. Douglass' work at a rate of $125 per hour. The district court set Ms. Douglass' rate at this amount, despite the fact that the Kattans submitted a declaration stating that Ms. Douglass' normal billing rate in her private practice was $150 per hour. For the reasons stated below, we uphold the district court's calculation of fees for Ms. Douglass' services.

The HCPA provides that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(e)(4)(C). Both parties agree that an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984). The parties disagree as to whether the district court was justified, under this principle, in setting Ms. Douglass' rate at $125 instead of her normal billing rate of $150.

A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled

disregard for the record evidence. *King v. Palmer*, 950 F.2d 771, 786 (D.C. Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1290 (1992) & 112 S. Ct. 3054 (1992). No such problems exist in the district court's fee award. The district court applied the law correctly and considered all the available evidence in setting the disputed rate.

The following evidence was available for the district court to consider when it established Ms. Douglass' rate: (1) an affidavit submitted by Ms. Douglass, stating her standard rate of $150 per hour and summarizing her education and experience; (2) a declaration by a local expert retained by the Kattans, setting out broad ranges of fees generally charged by attorneys with various levels of experience in Washington, D.C.; and (3) reports of similar cases in which fees were awarded for comparable work.

In its opposition to the Kattans' application for attorneys' fees, the District suggested that the district court award Ms. Douglass' fees at $75 per hour, the same rate awarded in *Stebbing v. District of Columbia*, another EHA case. C.A. No. 86–2549 (D.D.C. March 2, 1988). The district court, however, refused to set the rate at $75 per hour, because in *Stebbing* "the litigation was not very complicated." On the other hand, the district court noted that "other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time." The court specifically referred to *Moore v. District of Columbia*, 674 F. Supp. 901 (D.D.C. 1987), an EHA case handled by a leading EHA firm in the District. The district court further noted that the plaintiffs had failed to cite a single case in which the fee award was greater than $125.

"In light of the relevant case law and the affidavits submitted by Ms. Douglass," the district court reasonably determined that $125, a figure within the expert's range for attorneys with Ms. Douglass' experience, was the prevailing community rate for Ms. Douglass' services. In setting the fee, the district court considered Ms. Douglass' professional history, the complexity of the case, and the fees awarded in similar cases to attorneys with similar experience. Nothing

more was required. Keeping sight of the deference which we owe the district court's fee determinations, we find no reason to overturn the district court's decision.

Finally, the Kattans contend that the district court erred by failing, when establishing Ms. Douglass' rate, to take into account a subparagraph of the HCPA, 20 U.S.C. § 1415(e)(4)(G). That subparagraph provides that the court should not reduce attorneys' fees that "unreasonably exceed[ ] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation," as it is required to by § 1415(e)(4)(F)(ii), if it finds that "the State or local educational agency unreasonably protracted the final resolution of the action or proceeding."

In 1988, the Kattans, asserting that the District had unreasonably protracted the litigation, moved for sanctions against the District under 20 U.S.C. § 1415(e)(4)(G), as well as under 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The Kattans argued in their supporting memoranda that the District's dilatory tactics warranted a greater fee award than that permitted under the HCPA's basic fee-shifting provision.

The Kattans contend that the district court neglected to consider their § 1415(e)(4)(G) claim. In its order of October 1, 1991, the district court expressly rejected the Kattans' motion for sanctions, stating that "[a]lthough defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927." Although the district court did not explicitly mention § 1415(e)(4)(G), it implicitly rejected the Kattans' claim under that provision as well, since the Kattans relied on all three provisions in the same motion. In any case, the court clearly made findings as to the blameworthiness of the District's conduct sufficient to reject the Kattans' § 1415(e)(4)(G) claim. We are in no position to second-guess the district court's judgment as to whether the District of Columbia's tactics were unreasonable enough to warrant the award of extra fees.

III. CONCLUSION

Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposition to the Kattans' application for fees, we find that the District waived the issue and cannot raise it for the first time on appeal. We further hold that the district court was justified in setting Ms. Douglass' fees at $125 per hour. We therefore uphold the district court's fee award in all respects.

It is so ordered.

Circuit Judge D. H. GINSBURG, concurring in part and dissenting in part: The district court decided that *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), in which the Supreme Court held that a *pro se* litigant is not entitled to an attorney's fee under 42 U.S.C. § 1988, does not bar the award of an attorney's fee to a *pro se* litigant under the Handicapped Children's Protection Act. The reason? Simply that "plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision." *Kattan v. District of Columbia*, No. 88–0630 (D.D.C. December 11, 1991), slip op. at 3. This is the proverbial distinction without a difference.

The fee-shifting provision of the HCPA is practically identical to that of § 1988, and the Supreme Court has long required that similar fee-shifting provisions in federal statutes be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("We have stated that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (same standards for awarding attorney's fee apply under all statutes authorizing award of fee to a "prevailing party"); *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973) (similarity in wording of two statutory fee-shifting provisions is a "strong indication that the two statutes should be interpreted *pari passu*").

The Court in *Kay v. Ehrler* also stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." 111 S. Ct. at 1437. I see no reason to think that the word "attorney" in the fee-shifting provision of § 1988 has a different meaning than it has in the fee-shifting provision of the HCPA. The district court's cursory "analysis" surely offers none.

The district court's grant of a fee for the work performed by Mr. Kattan was clearly an error. The court, however, declines to reach the merits of that question, *see* Ct. Op. at 5, holding that "the District of Columbia waived the issue of Mr.

Kattan's eligibility for fees by not raising it in the district court in a timely manner." Ct. Op. at 8. I disagree.

The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), which held that a *pro se* lawyer was eligible for fees under the Freedom of Information Act, and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence v. Staats*, 585 F. Supp. 1375 (D.D.C. 1984), between the fee provision of the FOIA and that of § 1988 ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct. Op. at 7 (lauding the district court for "a well-reasoned opinion" in *Lawrence v. Staats*).

It is simply unreasonable to penalize the District of Columbia for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

Finding no waiver of the District's objection, I respectfully dissent from the court's decision affirming the award of an attorney's fee to the *pro se* plaintiff.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM OPINION

On August 9, 1988, the Court issued a Memorandum Opinion, 691 F. Supp. 1539 (D.D.C. 1988), granting plaintiffs relief under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-61. Although the Court at that time noted that plaintiffs were entitled to attorneys' fees and costs pursuant to 20 U.S.C. § 1415(e)(4)(B), the amount of the fee awaited full briefing. Presently pending are plaintiffs' application for fees and costs and plaintiffs' renewed motion for sanctions. For the following reasons, plaintiffs shall be awarded attorneys' fees and costs in the amount of $90,488.83, and plaintiffs' renewed motion for sanctions is denied.

I. DISCUSSION

Pursuant to 20 U.S.C. §1415(e)(4)(B), "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party."[1]

First, the Court must consider whether the applicants are prevailing parties. As the Supreme Court has suggested,

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[1] No bonus or multiplier may be used in calculating the fees awarded under this section. *See* 20 U.S.C. § 1415(e)(4)(C).

"[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted); *Medford v. District of Columbia*, 691 F. Supp. 1473, 1479 (D.D.C. 1988). In the instant case, it is clear that although plaintiffs were not awarded all of the requested relief, they have succeeded on a significant issue: Plaintiff, Sarah Kattan, was placed in Ivymount School at defendants' expense.

Next, the Court must next discern whether the requested fee is reasonable. In calculating the appropriate fee, the Court should consider the reasonable hourly rate of the lawyers, the adequacy of the documentation in support of the applicant's fee request, and the number of hours the lawyers reasonably expended. *See Hensley*, 461 U.S. at 433; *Holmes v. District of Columbia*, 680 F. Supp. 40, 44 (D.D.C. 1988). Defendants argue that plaintiffs' petition is deficient in all three respects.

In evaluating the reasonableness of the hourly rate, the Court may look to "the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980). Although plaintiffs[']counsel have requested $150 per hour for the work of Ms. Douglass and $125 per hour for Mr. Kattan's services, defendants maintain that plaintiffs[ ] are entitled to no more than $90 and $75 respectively for their services. The Court cannot accept either parties' position.

Although defendants suggest that the fees awarded in a similar litigation, *Stebbing v. District of Columbia*, No. 86-2549, slip. op. (Mar. 2, 1988), where the prevailing party was awarded $100 per hour for partner time and and $70 per hour for associate time, is controlling, the Court cannot agree. In *Stebbing*, the Court emphasized that the litigation was not very complicated. In fact, only a few pleadings had been filed in that case. On the other hand, plaintiffs have failed

to cite a single case in which the fee award was greater than $125 per hour.

It is clear that $125 per hour represents an appropriate rate for Ms. Douglass' services. Ms. Douglass has had more than thirteen years of experience, mostly in the area of civil litigation. In addition, she billed at $165 to $180 per hour before practicing law as a sole practitioner. And E. Joseph Kallas, a partner in the Law Firm Services Group of Price Waterhouse, who does consulting and survey work with several dozen Washington, D.C. firms, has suggested that a senior associate would bill within a range of $110 to $175 and that an attorney who has been a partner for three or more years would bill within a range of $135 to $250. Declaration of E. Joseph Kallas, Application, Exhibit E. Moreover, other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time.[2] In light of the relevant case law and the affidavits submitted by Ms. Douglass, the Court concludes that $125 per hour is the prevailing community rate for Ms. Douglass' services.

The prevailing community rate for Mr. Kattan is somewhat more difficult to determine. Plaintiffs contend that Mr. Kattan's services are worth $125 per hour while defendants maintain that he is only entitled to $75 per hour. The Court, again, cannot accept either party's position.

Although Mr. Kattan has no billing history to guide the Court in setting a reasonable hourly rate, plaintiffs have provided the Court with evidence of Mr. Kattan's impressive educational and legal background to substantiate plaintiffs' fee request of $125 per hour.[3] In addition, according to Mr.

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[2] *See, e.g., Moore v. District of Columbia*, 674 F. Supp. 901 (D.D.C. 1987).

[3] Mr. Kattan graduated *cum laude* from the Northwestern University School of Law in 1976. He served as a Bigelow Teaching Fellow and Instructor at the University of Chicago Law School until 1977. From 1977 to 1978 he was a Fellow in Public Policy Studies at the Committee on Public Policy Studies at the University of Chicago. From 1978 to 1984, Mr. Kattan worked at the Office of Hearings and Appeals of the United States Department of Energy, serving as Assistant Director from 1980

[Footnote continued on the next page]

Kattan's current job performance, he received an "outstanding" overall performance evaluation as a Senior Antitrust Attorney at the FTC. Finally, Mr. Kattan was the sole counsel prior to April 22, 1988, and he was the sole author of plaintiffs' pleadings prior to that date.[4]

Although Mr. Kattan's increased participation necessitates a higher fee award than the typical $75 per hour "associate counsel" rate, Mr. Kattan's activities do not merit the $125 per hour rate requested. The Court has evaluated $125 per hour to Ms. Douglass as reasonable hourly compensation, and plaintiffs have admitted that Mr. Kattan's role was subordinate to Ms. Douglass. Accordingly, based on Mr. Kattan's declaration and the supporting affidavits, the reasonable hourly rate for his services is evaluated at $100 per hour, this rate reflecting the prevailing community standard for similar work.

Defendants next challenge both the documentation of the hours claimed in plaintiffs' application and plaintiffs' billing judgment in preparing the application.

Defendants' contention that plaintiffs' application is not properly documented is wholly without merit. As required, plaintiffs[ ] have submitted time records that reveal the amount of time expended, a short description of how that time was utilized, the date of the work, and the name of the attorney responsible for the services. *See Moore*, 674 F. Supp. at 904-05. Furthermore, these records were prepared contemporaneously and were totalled daily.

It is not as obvious, however, that plaintiffs have excluded from the fee calculation "hours that were not 'reasonably

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[Footnote continued from the previous page]
to 1984. Since 1984, he has been employed at the Federal Trade Commission ("FTC"), and is currently a senior antitrust attorney in the Planning Office of the Bureau of Competition of the FTC. *See* Declaration of Joseph Kattan Pursuant To 28 U.S.C. § 1746 ("Kattan Decl."), Application, Exhibit B, at ¶ 12.

[4] These pleadings included plaintiffs' complaint; plaintiffs' motion for a preliminary injunction; plaintiffs' first set of requests for interrogatories and document production; and plaintiffs' application for permanent injunction. *See* Kattan Decl., at ¶ 7.

expended.' " *See Hensley*, 461 U.S. at 433-34 (citation omitted). Specifically, the Court cannot conclude that the hours expended in pursuing plaintiffs' renewed motion for sanctions represents a legitimate cost. Although defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927. Thus, plaintiffs' renewed motion for sanctions is denied, and plaintiffs' hours, and requested compensation, shall be reduced by the amount of time expended in pursuit of sanctions. This results in a reduction of 14.5 hours for Ms. Douglass and 32 hours for Mr. Kattan.[5]

For all hours other than those spent in conjunction with plaintiffs' work on motions for sanctions, the Court is satisfied that plaintiffs have exercised reasonable billing judgment and have claimed only "reasonable hours." Plaintiffs[ ] have provided the Court with detailed documentation of their billing judgment and have cited the numerous hours omitted from the fee application. Moreover, although defendants have raised several objections in response, their objections consist of arbitrary, conclusory assertions regarding the amount of time that plaintiffs "should have spent" on certain documents and litigation tasks. And it is "neither practical nor desirable to expect the trial court judge to [review] each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours." *Copeland*, 641 F.2d at 903. Accordingly, the total number of hours reasonably exercised by the plaintiffs' counsel are 304 hours for Ms. Douglass and 430.5 hours for Mr. Kattan, and the lodestar amounts are $38,000 for Ms. Douglass and $43,050 for Mr. Kattan.

In addition to the lodestar amounts detailed above, plaintiffs also seek reimbursement of $6,346.83 in costs paid

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[5] These figures represent the best efforts of the Court to determine the amount of time spent on plaintiffs' original motion for sanctions, voluntarily withdrawn by plaintiffs without prejudice on April 15, 1988, as well as the amount of time spent on plaintiffs' renewed motion for sanctions.

by Ms. Douglass and $3,092 in costs paid by Mr. Kattan, including *inter alia*, expert witness fees, postage fees, copying fees, messenger fees, transportation fees, and court reporter fees. It is clear that plaintiffs are entitled to all expenses associated with the litigation.

Defendants concede that plaintiffs are entitled to $3,092 of costs to Mr. Kattan, and this sum is indeed a reasonable expense of litigation "that they would normally expect to pass on to fee paying clients." *McKenzie v. Kennickell*, 645 F. Supp. 437, 452 (D.D.C. 1986) (citation omitted). As for the remaining costs, however, defendants contend that $1,264 is unwarranted. Specifically, defendants object to the expert witness fee to Price Waterhouse for the Declaration of E. Joseph Kallas.

Although defendants label this expenditure "unnecessary and excessive," the expenditure is reasonable in light of plaintiffs' burden of proof regarding "prevailing community rate" in the attorneys' fees request. *See Blum v. Stenson*, 465 U.S. 886 (1984). Moreover, this expense also would, in the usual course, be passed on to the fee paying client, and thus, Ms. Douglass is entitled to full reimbursement for her costs.

II. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that plaintiffs' application for attorneys fees is granted in the total amount of $90,488.83; and it is

FURTHER ORDERED that plaintiffs' renewed motion for sanctions is denied.

A separate judgment accompanies this memorandum.

IT SO ORDERED.

OCTOBER 16, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

[FILED: OCTOBER 17, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion issued this date, judgment is entered in favor of plaintiffs and against defendants in the amount of ninety thousand, four hundred, eighty-eight dollars and eighty-three cents ($90,488.83).

IT IS SO ORDERED.

OCTOBER 16, 1991.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[FILED: OCTOBER 17, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

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Plaintiffs,

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ORDER

On August 9, 1988, the Court issued a Memorandum Opinion, 691 F. Supp. 1539 (D.D.C. 1988), granting plaintiffs relief under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-61. On October 16, 1991, the Court issued another Memorandum Opinion, granting plaintiffs' application for attorneys' fees in the total amount of $90,488.83.

Presently pending are plaintiffs' motion to correct clerical mistake and defendants' motion to alter or amend the October 16, 1991 decision. For the following reasons, plaintiffs' motion is granted in part, and defendants' motion is denied.

In defendants' motion for reconsideration, they urge the Court to extend the rationale and application of *Kay v. Ehrler*, 111 S. Ct. 1435 (1991) to the instant case. In *Kay v. Ehrler*, an attorney who had been denied a place on the ballot for the Democratic presidential primary in Kentucky brought an action seeking to declare unconstitutional the Kentucky statute upon which the denial had been based. He initially appeared *pro se*, but later hired an attorney to represent him. After mounting a successful constitutional challenge, he applied for attorneys' fees under 42 U.S.C. § 1988. The Supreme Court upheld the District Court's decision to award fees only to plaintiff's retained counsel,

reasoning that denying the petitioner attorney's fees for his *pro se* representation would create an incentive for civil rights victims to retain counsel in subsequent cases.

The Court cannot agree with defendants that the analysis of *Kay v. Ehrler* should be applied to the instant case. First, in defendants' original opposition to plaintiffs' motion for fees and costs, they conceded that attorneys' fees were available under 20 U.S.C. §1415(e). In addition, they agreed that plaintiffs were entitled to an award of fees and costs. In fact, they had indicated their willingness to explore settlement of plaintiffs' application. Nowhere in their opposition did defendants argue that Mr. Kattan should recover nothing because he was representing himself. Rather, defendants only disputed the hourly rates requested and the total number of hours expended.

It is well settled that a motion to amend judgment is not to be used to raise new arguments that could, and should have been raised before judgment. Thus, it appears that defendants have waived the argument they now advance by failing to raise it at the appropriate time.[1]

In any event, plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision. And defendants have not cited any legislative history or caselaw that supports defendants' argument to extend the ambit of *Kay v. Ehrler* to EHA cases. Consequently, defendants' motion to alter or amend the judgment must be denied.

Plaintiffs also request that the Court amend its judgment of October 16, 1991 to correct a clerical error. Specifically plaintiffs contend that the Court overlooked plaintiffs' request for additional fees and costs incurred by Ms.

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[1] Although defendants further argue that their Rule 59 motion is based on a change of law not reasonably anticipated by the defendants, this District had ruled in 1984 that attorneys representing themselves are not entitled to attorneys' fees under 42 U.S.C. § 1988. *See Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *aff'd in relevant part*, 931 F.2d 1579 (D.C. Cir. 1991).

Douglass in preparing a reply to defendants' opposition toplaintiffs' application for fees, which reply was filed on November 7, 1988.[2]

The Court intended to compensate plaintiffs for their fees reasonably expended and costs incurred in preparing plaintiffs' application and reply. However, as plaintiffs correctly point out, the Court did not intend to compensate plaintiffs for the time expended in preparing their renewed motion for sanctions. Accordingly, plaintiffs shall be entitled to additional compensation for 13.75 hours, totalling $1,718.75, and $192.48 for additional costs.

Accordingly, for the reasons expressed herein, it is hereby

ORDERED that defendants' motion to alter or amend judgment is denied; it is

FURTHER ORDERED that plaintiffs' motion to correct clerical mistake is granted in part; and it is

FURTHER ORDERED that plaintiffs' application for attorneys' fees shall be granted in the total amount of $92,400.06.

An amended judgment, intended to supercede the judgment entered on October 30, 1991, accompanies this Opinion.

IT IS SO ORDERED.

DECEMBER 11, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

[2] Plaintiffs' additional request for fees is noted at footnote 1 on page 1 of Plaintiffs' Reply Memorandum in Support of Renewed Motion for Sanctions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

AMENDED JUDGMENT

In accordance with the Order issued this date, judgment is entered in favor of plaintiffs and against defendants in the amount of ninety-two thousand, four hundred dollars and six cents ($92,400.06).

IT IS SO ORDERED.

DECEMBER 11, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS
AND NEXT FRIENDS SUSAN J. THOMAS
AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellants

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* D. H. GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of the District of Columbia, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones for
ROBERT A. BONNER
Deputy Clerk

Circuit Judge D. H. Ginsburg would grant the Petition for Rehearing.

FILED: OCTOBER 6, 1993

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, *et al.*, *Appellants*

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, AND RANDOLPH, *Circuit Judges.*

ORDER

The Suggestion For Rehearing *En Banc* of the District of Columbia has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones for
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the suggestion.

FILED: OCTOBER 6, 1993

Supreme Court of the United States

No. A-433

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, ETC., *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 3, 1994.

/s/ William H. Rehnquist
Chief Justice of the United States

DATED THIS 23RD DAY OF NOVEMBER, 1993.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, *et al.*, *Appellants*

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* D. H. GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellants' motion to clarify and to vacate, it is

ORDERED, on the court's own motion, that the District of Columbia submit a supplemental memorandum of no more than five pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing *en banc* because it did not receive the court's June 30, 1993, order. The supplemental memorandum shall be filed on or before December 16, 1993.

Per Curiam
For the Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones

LINDA JONES
Deputy Clerk

FILED: DECEMBER 9, 1993

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

USDC CV 88-0630

No. 92-7011

SARAH KATTAN, BY HER PARENTS
AND NEXT FRIENDS SUSAN J. THOMAS
AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellants

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellants' Motion to Clarify and to Vacate, filed November 22, 1993, and appellants' supplemental memorandum filed on December 14, 1993, it is

ORDERED, by the Court, that the motion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

FILED: DECEMBER 21, 1993

Excerpts From
GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 92-7011

DATE	FILINGS—PROCEEDINGS
(cb)06-15-93	Opinion for the Court filed by Chief Judge Mikva. Circuit Judge D.H. Ginsburg concurring and dissenting in part.
(cb)06-15-93	Judgment for the Court that the judgment of the district court is hereby affirmed, in accordance with the opinion for the Court filed herein this date.
(cb)06-15-93	Order delaying mandate.
(W)06/29/93	5-Appellee/Cross-Appellant's bill of cost (m-29) [9].
(H)07/08/93	20-Appellee/Cross-Appellant's (D.C.) petition for rehearing and suggestion for rehearing *En Banc* (m-08) [1].
(H)07/12/93	5-Appellant/Cross-appellee's (D.C.) response to Bill of Costs (m-12) [9].
(H)10/06/93	Per curiam Order that the petition for rehearing filed by the District of Columbia is denied. (Mikva, Chief Judge; D.H. Ginsburg and Sentelle, Circuit Judges. (Circuit Judge Ginsburg would grant the petition for rehearing).
(H)10/06/93	Per Curiam Order En Banc that the suggestion for rehearing En Banc of the District of Columbia is denied. (Circuit Judge Williams would grant the suggestion).

DATE	FILINGS—PROCEEDINGS
(W)11/22/93	5-Appellant's motion to clarify and to vacate (m-22) [1].
(W)12/02/93	5-Appellee's response to motion to clarify and to vacate and alternate suggestions as to appropriate procedures (m-02) [1].
(N)12/09/93	Per Curiam Order to clarify and vacate, it is ORDERED on the court's own motion that DC submit a supplemental memorandum of no more than 5 pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing en banc because it did not receive the court's 6/30/93 order. Before: Mikva, Chief Judge; D.H. Ginsburg and Sentelle, Circuit Judges. SEE ORDER FOR DETAILS.

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 93-1296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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Counsel for Respondents.

March 16, 1994

Washington, D.C. • THIEL PRESS • (202) 328-3286

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Must a court of appeals reverse a district court's exercise of its discretionary power to award attorneys' fees where the district court found that the defendants below waived any objection to the fees based on the *pro se* nature of the representation by ignoring judicial authority in that same court supporting such an objection and by failing to object to the award on such grounds before judgment?

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No. 93-1296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS SARAH KATTAN *ET AL.* IN OPPOSITION

Respondents Sarah Kattan and her parents Susan J. Thomas and Joseph Kattan respectfully request that this Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the D.C. Circuit.

STATEMENT OF THE CASE

At trial of this case in 1988, Sarah Kattan was a five-year old girl suffering from multiple disabilities. Petitioners, the District of Columbia and its officials, had evaluated Sarah and selected an educational program for her which they represented would meet her needs. Her parents unsuccessfully challenged the appropriateness of the placement at an administrative hearing, and then brought suit in the district court as parents and next friends of Sarah pursuant to 20 U.S.C. §1415(e).[1] Mr. Kattan and Ms. Thomas were also Plaintiffs in the district court action in their individual capacities as the beneficiaries of various procedural rights provided by the EHA.[2]

At the administrative stages of the case and in the early weeks of the district court action, Mr. Kattan – at the time an attorney with the U.S. Federal Trade Commission – represented the Plaintiffs. At the suggestion of

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[1] The Education for All Handicapped Children Act, 20 U.S.C. §1400 *et seq.* ("EHA"), required each state and local public school district receiving federal funds to provide all children with a free education "appropriate" to their needs. 20 U.S.C. §1412. *District Bd. of Educ. v. Rowley*, 459 U.S. 176, 188-89 (1982).

The EHA has been renamed the Individuals with Disabilities Education Act. See Petition at N.1. For simplicity and for consistency with the decisions below, in this Opposition we continue to refer to the statute as EHA.

[2] The parents of a handicapped child have the right to an impartial administrative hearing to test the appropriateness of their child's placement. 20 U.S.C. §1415(b)(1)(E) and (2). And if the child prevails in a district court action challenging the placement, the district court is given discretion to award reasonable attorneys' fee to that child's parents. 20 U.S.C. §1415(e)(4)(B).

The EHA thus creates a substantive right to an appropriate education that runs to the handicapped child and certain procedural protections to ensure the availability of that right that run to the parents.

the district court, he subsequently associated co-counsel, and he and co-counsel jointly brought the case to judgment on the merits. The district court's decision on the merits, dated August 9, 1988, included a holding that the Plaintiffs' "request for reasonable attorneys' fees and costs associated with the action will be granted[3] in an amount to be determined through subsequent filings, as necessary."[4] Plaintiffs' "attorneys" were, of course, none other than Mr. Kattan and his co-counsel. No appeal was taken from this decision.

When the Kattans submitted their fee application, Petitioners attacked it on multiple grounds, arguing at length why the amounts sought were excessive. Petitioners

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[3] 20 U.S.C. §1415(e)(4)(B) provides, in relevant part, that in a civil action to enforce the EHA brought under §1415, "the court, *in its discretion*, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party." (emphasis added)

[4] *Kattan by Thomas v. D.C.*, 691 F. Supp. 1539, 1547, 1548 (D.D.C. 1988). This decision on the merits is important to a meaningful consideration of this Petition for Certiorari. The district court granted extensive relief to the Kattans under the EHA, and made it clear that the Defendants below, Petitioners here, forced the Plaintiffs to prove a negative – that the District of Columbia could not and would not provide Sarah with an appropriate educational program – in the face of overwhelming evidence that Defendants well knew that there was in fact no program such as that promised to Sarah in place in the District of Columbia and that hundreds of other children needing identical services were not receiving them.

The vigor with which Petitioners defended the merits of the case below was presented to the Court of Appeals for its consideration as relevant to its review of the district court's discretionary rulings and as relevant to its consideration of whether "justice under the circumstances" required reversal under that Court's discretionary authority arising from 28 U.S.C. §2106. This Court too is being asked to afford "justice under the circumstances," and should be mindful of the context described above.

claimed that the hourly rates for Mr. Kattan and for his co-counsel were too high, argued that the bills submitted were insufficiently detailed and lacked supporting documentation, contended that the hours spent by both lawyers were disproportionate to the relief sought and obtained, and attacked as "excessive" Plaintiffs' use of an expert witness on the question of the prevailing rate for comparable legal services. Yet despite their aggressive approach to the issue of counsel fees, Petitioners explicitly conceded that Mr. Kattan should be compensated for time he spent as a lawyer on this case, albeit for less hours and at a lower rate than requested.[5] Nowhere did Petitioners argue that Mr. Kattan should be entitled to no compensation whatsoever for his legal services because he was allegedly representing himself.

At the time of Petitioners' opposition to the fee application, there was no case in any court that had addressed the question whether attorney parents representing their children in EHA cases are entitled to fees for their legal services.[6] As to fees for *pro se* representation under other fee-shifting statutes, this Court had yet to address the issue. The D.C. Circuit had held that fees were available to *pro se* litigants under FOIA, *Cuneo v. Rumsfeld,* 553 F.2d 1360, 1366 (D.C. Cir. 1977), but in so holding cited cases from other jurisdictions coming down on both sides of the issue, and commented as follows:

> "The law is not clear on the question of whether a party appearing on his own behalf, who is also an attorney, is entitled to tax attorney fees as costs."

553 F.2d 1366 & n.18.

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[5] *See* Joint Appendix in Nos. 92-7011 and 92-7012, in the Court of Appeals for the D.C. Circuit at 121.

[6] Respondents are aware of no such decision today.

Petitioners must have been aware that such an argument was available to them, for in their fee application the Kattans explicitly cited *Cuneo* and raised the issue of *pro se* representation.[7] Moreover, the District Court for the District of Columbia – the very Court in which the application was pending – had held in 1984 that *pro se* attorneys were ineligible for fee awards under 42 U.S.C. §1988. *Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *affirmed sub nom Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991). In that decision, the court distinguished the *Cuneo* case because of policy matters specific to FOIA and cited at least seven cases from other jurisdictions (including cases from five federal circuits) that had concluded that fees were not available to *pro se* litigants under 42 U.S.C. §1988.

The district court inexplicably failed to act on the Kattans' fee application for nearly three years, but finally issued an opinion and a final judgment granting the application in part on October 16, 1991. App. 26a-31a. Included in that award were fees for legal services performed by Mr. Kattan.

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[7] In footnote 33 to their fee application, Respondents had stated:

> . . . A few cases discuss the question whether an attorney should receive attorney's fees at all when he appears *pro se*. *See, e.g., Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (under the attorneys' fees provision of the Freedom of Information Act, a plaintiff appearing on his own behalf who is also an attorney should not be denied those fees simply because he is an attorney and has not incurred liability to pay those fees). Mr. Kattan has not been appearing here *pro se*; he is a named plaintiff only in the role of parent and "next friend" to his minor daughter, who cannot bring suit in her own name.